SUPREME COURT, U. S.

No. 1278

FILED
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

CHARLES R. ARMSTRONG,

Petitioner,

v.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

CHARLES R. ARMSTRONG
12 Underwood Place, N.E.
Washington, D.C. 20012
Petitioner

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No:

CHARLES R. ARMSTRONG,

Petitioner,

v.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

PETITION BY CHARLES R. ARMSTRONG, FOR A WRIT OF CERTIORARI TO REVIEW A JUDGMENT OF THE UNITED STATES COURT OF CLAIMS ENTERED JANUARY 24, 1969, DISMISSING A PETITION FOR A MONEY JUDGMENT AGAINST THE UNITED STATES.

To the Chief Justice of the United States and the Associate Justices of the Supreme Court:

I

SUMMARY OF THE MATTER INVOLVED

That the material facts in this case are not in dispute:

Petitioner, a veteran preference eligible, was a GS-11 Architectural Engineer when on February 28, 1963, he

received an Advanced Warning of Unsatisfactory Rating. On June 20, 1963, petitioner received a memo concerning technical deficiencies in his work. This memo stated that petitioner had 90 days to correct these deficiencies, although later this period was extended to October 2, 1963. On October 21, 1963, petitioner received a notice that the Advanced Warning of Unsatisfactory Rating was withdrawn due to a procedural error and that his rating as of April 30, 1963, was satisfactory. On the same day, petitioner also received a notice of Proposed Removal For Inefficiency. That proposal was based upon seven charges, each of which cited numerous examples—82 in the first charge—of errors of judgment, omission, and commission in petitioner's work. That letter informed petitioner of his right to respond to the charges and to a hearing. Subsequent to an agency hearing, some of the examples of errors were withdrawn from the charges but the agency found that the remaining seven charges were sufficient to warrant removal and petitioner was removed for inefficiency effective July 17, 1964. Petitioner then appealed to the Civil Service Commission (CSC) charging that the VA had not complied with the Veterans Administration procedural regulations (*infra*, p. 5) governing procedures for removing employees. That the CSC Appeals Examining Office, which was upheld by the Board of Appeals And Review (BAR) on October 20, 1965, found that the charges of inefficiency in petitioner's work were supported by the evidence and that the agency complied with its own procedural regulations and the CSC's procedures regarding removal.

Gravamen of the Case

That the argument which petitioner urges most vociferously is that the removal was improper for the reason that the "Statement of Charges" of inefficiency related "SOLELY" to incidents prior to receipt or before petitioner's satisfactory rating became effective. That the Court of Claims stated in its "slip opinion" at page A-4, Appendix attached hereto—

* * *

> . . . It is true that all of the incidents of alleged inefficiency occurred before he received the notice of his satisfactory rating; however, that notice stated that the rating was effective as of April 30, 1963. The processing of ratings takes time and it is not unusual to have a time lag between the effective date of the rating and the date the employee is notified of his rating. We believe that the rating of satisfactory spoke as of the date it was effective, April 30, 1963.
>
> * * *

at page A-6:

> . . . Plaintiff contended that the agency failed to follow its own regulations in violation of Service v. Dulles, 354 U.S. 363 (1957), but from what we have said it is clear that the agency did follow its own regulations in removing the plaintiff.
>
> * * *

Subsequently, petitioner made application (A.7, ~~pending~~) to the Court below, to vacate its judgment of January 24, 1969, and in that motion, petitioner pointed out with particularity the "procedural errors" consummated or committed by the Veterans Administration in removing petitioner from government service–

"4. That the Veterans Administration committed the following "procedural errors":

(a) Assignment of Rating to plaintiff during "warning of unsatisfactory performance on the established rating date", April 30, 1963 which should have been enlarged from April 30, 1963 until October 2, 1963, the date of termination of the "warning period". In other words, plaintiff was not entitled to any kind of "Rating" on April 30, 1963, for the reason that the "warning period" was pending on the "established rating date";

(b) Assignment of a "Satisfactory Rating" issued October 21, 1963 or "withdrawal" of "unsatisfactory rating" was defective for the reason that the "Pending Statement of Charges" were re-

solved adversely to Plaintiff; and further that, Plaintiff is entitled to a "Satisfactory Rating" "only" if the "Pending Statement of Charges" were resolved in Plaintiff's favor, and

(c) That plaintiff was entitled to be assigned "a rating" at least every eighteen months and that the "Rating Period" for plaintiff is or was established as April 30, 1963 or October 1963, one year prior to April 30, 1964, the established rating date, for the reason that the "warning period" enlarged the April 30, 1963, the termination date for the "established rating date".

II

JURISDICTIONAL STATEMENT

That jurisdiction of this Court is invoked, pursuant to 28 USCA 1255:

> Cases in the Court of Claims may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted on petition of the United States or the claimant;
>
> (2) By certification of any question of law by the Court of Claims in any case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions on such question. June 25, 1948, c. 646, 62 Stat. 928.

That the Court below rendered its judgment, January 24, 1969.

III

STATUTE INVOLVED (REGULATIONS)

That the procedures which petitioner maintains were violated are found in the VA Personnel Policy Manual, MP-5, TS-118 (July 1, 1962). They provide:

14. DEMOTION OR REMOVAL FOR INEFFICIENCY

* * *

C. Steps in Procedure. * * * before taking action to remove an employee for inefficiency, the supervisory official should consider reassignment or demotion if there is a vacant position in which the employee could reasonably be expected to perform adequately. * * *

* * *

f. Demotion or Removal for Inefficiency When Employee's Current Performance Rating Is Satisfactory.

(1) An employee may be demoted or removed for inefficiency in spite of a current official performance rating of satisfactory or better. * * * The charges must not consist solely of incidents which occurred prior to the assignment of the current satisfactory rating, but rather relate primarily to subsequent developments.

* * *

That petitioner's Motion to Vacate was based upon VA Personnel Policy Manual, MP-5, TS-123 (October 5, 1963), which reads:

11. ANNUAL REVIEW AND RATING.

Each year, on or shortly after April 30 (June 30 for station Managers and Directors and Assistant Managers and Assistant Directors) every supervisor will review the performance of each of his immediate subordinates, and will assign each a performance rating which will reflect typical performance requirements of the employee's position, except that:

* * *

l. For an employee on notice on the rating date of proposed adverse action for inefficiency, or awaiting action to reassign, demote, or remove him for inefficiency following decision on such notice, no rating will be made unless and until the matter is resolved in the employee's favor. If and when the matter is thus favorably resolved, the employee will be informed that his rating his satisfactory.

12. PERIOD OF SERVICE COVERED.

The beginning of a rating period will be the date of entry into a position, the day following the end of the previous rating period, or 1 year prior to end of the current period, whichever is later. The end of the rating period will be the due date of the rating (April 30, June 30) except when the end of the period is delayed as provided in paragraph 11d.

11d. For an employee in a period of warning of unsatisfactory performance on the established rating date, the rating will be delayed till the end of the warning period.

FEDERAL PERSONNEL MANUAL, 430-6
Chapter 430. Performance Evaluation.

2-4 Specific Content of Plan

* * *

d. Time of rating. Employees at GS-10 and below must be rated at least annually, and employees at GS-11 and above must be rated at least every eighteen months.

* * *

IV

QUESTION PRESENTED

Whether or not the Veterans Administration complied with its "*own procedural regulations*" in discharging petitioner from his job in the Federal or Government Service, July 17, 1964?

V

REASONS FOR ALLOWANCE OF THE WRIT

Petitioner contends that the Veterans Administration's action is subject to attack under the principles established by this Court's decisions in *Accardi v. Shaughnessy*, 347 U.S. 260 (1954) and *Service v. Dulles*, 354 U.S. 363 (1957), namely, that regulations validly prescribed by a government agency or administrator are binding upon him or it as well as the citizen or employee, and that this principle holds even when the administrative action under review is discretionary in nature. Petitioner, as a GS-11, was required to be assigned a "rating" at least once every eighteen months, which meant that the established rating date for petitioner was April 30 or not later than October 31 of each year. Pursuant to VA regulation 11(d), "For an employee in a period of warning of unsatisfactory performance on the established rating date, the rating will be delayed until the end of the warning period," which was October 1963, at the end of petitioner's official "established rating date" of once every eighteen months as required by the U.S. Civil Service Regulation.

Now we come to the assignment of a "satisfactory rating" during the period of warning which cannot be done in the case at bar for the reason that the "Statement of Charges" was not favorably determined for petitioner. That regulation reads "For an employee on notice on the rating date of proposed adverse action for inefficiency, or awaiting action to reassign, demote, or remove him for inefficiency following decision on such notice, no rating will be made unless and until the matter is resolved in the employee's favor. If and when the matter is thus favorably resolved, the employee will be informed that his rating is satisfactory." So it appears from a perusal of the VA regulations that its letter of October 21, 1963 did not extricate itself from the "procedural morass or quagmire" into which it wandered; that letter states in pertinent part:

"To: Charles R. Armstrong

1. You are notified that because of a procedural error in our Advanced Warning of Unsatisfactory Rating of February 28, 1963, it is being withdrawn. Because of this, your rating as of April 30, 1963, is satisfactory.

2. That portion of the memorandum of June 20, 1963 which deals with technical deficiencies in your work remain in effect without change.

/s/ Chin Fun Kwok"

Respectfully submitted,

CHARLES R. ARMSTRONG

12 Underwood Place, N.E.
Washington, D. C. 20012

Petitioner

In the United States Court of Claims

No. 54–68

(Decided January 24, 1969)

CHARLES R. ARMSTRONG v. THE UNITED STATES

George D. Gates, attorney of record for plaintiff.
LeRoy Southmayd, Jr., with whom was *Assistant Attorney General Edwin L. Weisl, Jr.*, for defendant.

Before COWEN, *Chief Judge*, DURFEE, DAVIS, COLLINS, SKELTON and NICHOLS, *Judges*.

ON DEFENDANT'S MOTION TO DISMISS PETITION AND PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

NICHOLS, *Judge*, delivered the opinion of the court:

This is a suit for $60,000 more or less, the amount claimed by plaintiff for improper removal from his position with the Veterans Administration (VA). The case is before us on defendant's motion to dismiss, which will be treated as a motion for summary judgment under Rule 20(b), and on plaintiff's motion for summary judgment. The material facts in this case are not in dispute.

Plaintiff, a veteran preference eligible, was a GS–11 Architectural Engineer when on February 28, 1963, he received an Advanced Warning of Unsatisfactory Rating. On June 20, 1963, plaintiff received a memo concerning technical deficiencies in his work. This memo stated that he had 90 days to correct these deficiencies, although later this period was extended to October 2, 1963. On October 21, 1963, plain-

tiff received a notice that the Advanced Warning of Unsatisfactory Rating was withdrawn due to a procedural error and that his rating as of April 30, 1963, was satisfactory. On the same day, plaintiff also received a notice of Proposed Removal for Inefficiency. The proposal was based on seven charges, each of which cited numerous examples—82 in the first charge—of errors of judgment, omission, and commission in plaintiff's work. The letter informed plaintiff of his right to respond to the charges and to a hearing. After an agency hearing, some of the examples of errors were withdrawn from the charges but the agency found that the remaining charges were sufficient to warrant removal and plaintiff was removed for inefficiency effective July 17, 1964. Plaintiff then appealed to the Civil Service Commission (CSC) charging that the VA had not complied with its regulations governing procedures for removing employees. The CSC Appeals Examining Office, which was upheld by the Board of Appeals and Review (BAR) on October 20, 1965, found that the charges of inefficiency in plaintiff's work were supported by the evidence and that the agency complied with its own and the CSC's procedures regarding removal.

Plaintiff then filed suit in this court. To support his case, plaintiff relies on his claims that the VA violated its regulations concerning removal procedures and argues that the CSC was arbitrary and capricious in supporting his removal. For reasons to be discussed *infra*, we find no basis for plaintiff's claims, and his petition is dismissed.

The procedures which plaintiff maintains were violated are found in the VA Personnel Policy Manual, MP–5, TS–118 (July 1, 1962). They provide:

> 14. DEMOTION OR REMOVAL FOR INEFFICIENCY
>
> * * * * *
>
> c. *Steps in Procedure.* * * * before taking action to remove an employee for inefficiency, the supervisory official should consider reassignment or demotion if there is a vacant position in which the the employee could reasonably be expected to perform adequately. * * *
>
> * * * * *

> f. *Demotion or Removal for Inefficiency When Employee's Current Performance Rating is Satisfactory*
>
> (1) An employee may be demoted or removed for inefficiency in spite of a current official performance rating of satisfactory or better. * * * The charges must not consist solely of incidents which occurred prior to the assignment of the current satisfactory rating, but rather should relate primarily to subsequent developments.
>
> * * * * *

The parties have not disputed whether the Manual is a regulation, or whether the quoted requirements are mandatory or precatory. For purposes of this case, but without establishing a precedent, we assume resolution of these questions in plaintiff's favor.

Plaintiff charges that the agency should have reassigned or demoted him as the agency Personnel Manual provides and not removed him. The VA Personnel Manual states that the agency "should consider reassignment or demotion" before removal, but the notice of October 21, 1963, stated, and the CSC found, that the agency did attempt to find plaintiff another position and there were no positions available for which he qualified. As regards demotion, apparently the agency considered GS–11 its bottom rate for architects. Plaintiff offers no evidence to refute this but simply alleges the VA should have and could have found him another position. We have searched the record and find nothing to support plaintiff's allegation, and absent any showing that the CSC finding was arbitrary and capricious, it must stand. See *Heffron* v. *United States*, 186 Ct. Cl. (decided January 24, 1969); *Liotta* v. *United States*, 174 Ct. Cl. 91 (1966); *Harrington* v. *United States*, 161 Ct. Cl. 432 (1963); *Gaines* v. *United States*, 158 Ct. Cl. 497, *cert. denied*, 371 U.S. 936 (1962); *Indiviglio* v. *United States*, 156 Ct. Cl. 241, 299 F. 2d 266, *cert. denied*, 371 U.S. 913 (1962).

The argument which plaintiff urges most strongly is that the removal was improper because the charges of inefficiency related solely to incidents before his satisfactory rating became effective. Plaintiff claims that the satisfactory rating

was not effective until October 21, 1963, the date he received the notice of the rating and that all of the charges related to incidents before that date. It is true that all of the incidents of alleged inefficiency occurred before he received the notice of his satisfactory rating; however, that notice stated that the rating was effective as of April 30, 1963. The processing of ratings takes time and it is not unusual to have a time lag between the effective date of the rating and the date the employee is notified of his rating. We believe that the rating of satisfactory spoke as of the date it was effective, April 30, 1963.

But plaintiff claims that even if the satisfactory rating were effective April 30, 1963, the VA Personnel Manual provision was violated because four of the seven charges relate to incidents before that date, so that the charges do not "relate primarily to subsequent developments." However, the charges are worded to specify the dates when the work in question was assigned to plaintiff and not the dates when he submitted the work. Four of the projects were assigned before April 30, 1963, and plaintiff relies on the assignment dates to base his charges that more of the incidents relate to dates before the effective date of the rating and that therefore the incidents do not "relate primarily to subsequent developments." But we think that the critical dates for determining whether the incidents "relate primarily to subsequent developments" are the dates the work was submitted or perhaps later dates when the work was reviewed rather than the dates the projects were assigned to plaintiff, because not until the work was submitted could plaintiff's superior have been aware of the errors in his work. Four of the projects were submitted after April 30, 1963, and thus, in terms of sheer numbers, the charges relate primarily to developments subsequent to the effective date of his satisfactory rating.

Plaintiff also argues that the October 21, 1963, letter withdrawing the Advanced Warning of Unsatisfactory Rating in effect cancelled all of the charges against him. This warning was procedurally defective and thus had to be withdrawn. It is not withdrawn for any other reason. His work remained unsatisfactory, and the satisfactory rating was as-

signed him only because technically he could be given no other.

Plaintiff also claims his removal was in violation of the Performance Rating Act, 5 U.S.C. §§ 4301–4308 (Supp. III, 1965–1967) (formerly Performance Rating Act of 1950 as amended 64 Stat. 1098, 5 U.S.C. §§ 2001–2007). Under that provision, an employee may be removed for unsatisfactory performance but only after a 90 day advance warning and a "reasonable opportunity to demonstrate satisfactory performance." But the agency did give plaintiff a 90 day warning and an opportunity to improve. The CSC found that the agency had a series of guidance meetings after the June 20, 1963, notice to help plaintiff improve his work and apprise him of the caliber of work that was expected of him. In any event, plaintiff was removed under 5 U.S.C. § 7512 (Supp. III, 1965–1967), (Veterans' Preference Act) for specified inefficiencies. The Performance Rating Act does not control personnel action under an independent statute. *Creamer* v. *United States*, 174 Ct. Cl. 408, *cert. denied*, 385 U.S. 819 (1966). As we said in *Angrisani* v. *United States*, 172 Ct. Cl. 439 (1965), at p. 443:

> This court has stated, on numerous occasions, that the procedures of the Veterans' Preference Act, * * * and the Lloyd-LaFollette Act, * * * govern removals for cause; that the procedures of the Performance Rating Act, * * * are not applicable to such removals. * * *

An unsatisfactory performance rating is not a prerequisite to the removal of an inefficient employee. *Thomas* v. *Ward*, 225 F. 2d 953, 955 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 958 (1956); *Angrisani* v. *United States*, *supra*; *Chisholm* v. *United States*; 149 Ct. Cl. 8, 13 (1960). The court cannot substitute its judgment for that of the employing agency as to an employee's qualifications, if the agency's conclusion is honestly arrived at, without personal bias or malice. *Greenway* v. *United States*, 175 Ct. Cl. 350, *cert. denied*, 385 U.S. 881 (1966).

Plaintiff was a veterans preference eligible and as such his removal must accord with the provisions of that act, which it does. Both the CSC and the BAR found that the VA had complied with the procedural requirements for re-

moval and absent any showing that this finding was arbitrary and capricious it must stand. *Angrisani* v. *United States*, *supra*, at p. 443; *Houston* v. *United States*, 156 Ct. Cl. 38, 45, 297 F. 2d 838, 842, *cert. denied*, 371 U.S. 815 (1962). Plaintiff contended that the agency failed to follow its own regulations in violation of *Service* v. *Dulles*, 354 U.S. 363 (1957), but from what we have said it is clear that the agency did follow its own regulations in removing plaintiff.

Defendant in its motion to dismiss pleaded laches as a defense to plaintiff's action. Because we have disposed of this case on other grounds, we need not reach that issue. Defendant's motion to dismiss is granted. Plaintiff's motion for summary judgment is denied and his petition is dismissed.

[Filed February 3, 1969]

IN THE UNITED STATES COURT OF CLAIMS

CHARLES R. ARMSTRONG,

Plaintiff,

v. No. 54-68

THE UNITED STATES,

Defendant.

PLAINTIFF'S MOTION TO VACATE ORDER OF DISMISSAL ENTERED, JANUARY 24, 1969 RULE 68(a) (b), of This Court.

Plaintiff moves the Court for an order (1) granting a rehearing of the above-entitled cause at such time as may be convenient to the Court; (2) to vacate the judgment hereto entered herein, January 24, 1969; (3) upon vacating the same to enter judgment herein for plaintiff as prayed in his original Petition filed herein, February 12, 1968; and assigns the following as error and as Reasons and Grounds for this application:

1. That the Petition does state facts sufficient to constitute a cause of action–

Allegation: "10. That employees of GS-10 and below must be rated at least annually, and employees of GS-11 and above must be rated at least eighteen months, Federal Personnel Manual subchapter 2, Chapter 430; Performance Evaluation, page 430-6, paragraph 2-4(d)."

"d. Time of rating. * * * An agency may not make a rating based on performance until an employee has had at least three months' service in his position.

A rating may be postponed when an employee has served less than three months in his position, when his supervisor has changed recently,

or when the plan provides for postponement for another purpose. * * *

1(a). That the Veterans Administration, VA Personnel Policy Manual MP-5, TS-123, October 5, 1962, which was in effect at the time Plaintiff's alleged unlawful removal, reads:

"11. Annual Review And Rating

Each year, on or shortly after April 30 (June 30 for station Managers and Directors and Assistant Managers and Assistant Directors) every supervisor will review the performance of each of his immediate subordinates, and will assign each a performance rating which will reflect typical performance during the period in comparison with the performance requirements of the employee's position, except that:

e. For an employee on notice on the rating date of proposed adverse action for inefficiency, or awaiting action to reassign, demote, or remove him for inefficiency following decision on such notice,

no rating will be made unless and until the matter is resolved in the employee's favor.

If and when the matter is thus favorably resolved, the employee will be informed that his rating is satisfactory."

d. For an employee in a period of warning of unsatisfactory performance on the established rating date, the rating will be delayed till the end of the warning period.

"12. Period Of Service Covered

The beginning of a rating period will be the date of entry into the position, the day following the end of the previous rating period, or 1 year prior to the end of the current period, whichever is later. The end of the rating period will be due date of the rating (April 30, June 30) except when the end of the period is delayed as provided in paragraph 11(d)."

11(d) For an employee in a period of warning of unsatisfactory performance on the established rating date, the rating will be delayed till the end of the warning period.

3. That the following pertinent Regulations are submitted herewith in support of Plaintiff's Motion (that the Satisfactory Rating was effective October 21, 1963, and not April 30, 1963):

(a) VA Personnel Policy Manual MP-5, TS-123, October 5, 1962, Sections 11, 11(d), 11(e), and 12; and

3(b). Federal Personnel Manual, subchapter 2, Chapter 430, Performance Evaluation, page 430-6, paragraph 2-4(d) –Time of rating.

4. That the Veterans Administration committed the following "procedural errors":

(a) Assignment of Rating to Plaintiff during "Warning of unsatisfactory performance on the established rating date", April 30, 1963 which should have been enlarged from April 30, 1963 until October 2, 1963, the date of termination of the "warning period". In other words, Plaintiff was not entitled to any kind of "rating" on April 30, 1963, for the reason that the "warning period" was pending on the "established rating date";

(b) Assignment of "Satisfactory Rating" issued October 21, 1963 or "withdrawal" of "unsatisfactory rating" was defective for the reason that the "Pending Statement Of Charges" were resolved adversely to Plaintiff; and further that, Plaintiff is entitled to a "Satisfactory Rating" "only" if the "Pending Statement Of Charges" were resolved in Plaintiff's favor; and

(c) That plaintiff was entitled to be assigned "a rating" at least every eighteen months and that the "Rating Period" for plaintiff is or was established as April 30, 1963, or October 1963, one year prior to April 30, 1964, the established rating date, for the reason that the "warning period" enlarged the April 30, 1963, the termination date for the "established rating date".

5. There is not a "provision" in the Veterans Administration "procedural regulations" authorizing the agency to "amend", "alter", "modify", or "withdraw" an "Assigned

Rating". In other words, the agency must begin or commence proceedings anew.

6. Defendant admits that it has "performed various acts of fraud upon the Federal Courts" in the past in administering the Federal Personnel Laws in general and section fourteen of the Veterans' Preference Act in particular.

(a) That this Court's Ruling is in conflict with the proposition of law promulgated by the United States Supreme Court in Service versus Dulles, 354 US 363 (1957), and Hazel-Atlas versus Hartford Empire, 322 US at pages 247-248 (1944).

Wherefore, upon consideration of the premises, plaintiff's motion should be sustained.

Respectfully submitted,

/s/ Charles R. Armstrong
Plaintiff Pro Se
12 Underwood Place, Northeast
Washington, D. C. 20012

VETERANS ADMINISTRATION
Washington, D. C.

October 21, 1963

To: Charles R. Armstrong,
Director, Specifications Service,

Notice of Performance Rating.

1. You are notified that because of a procedural error in our Advanced Warning of Unsatisfactory Rating of February 28, 1963, it is being withdrawn. Because of this, your rating as of April 30, 1963, is Satisfactory.

2. That portion of the memorandum of June 20, 1963 which deals with technical deficiencies in your work remain in effect without change.

/s/ Chin Fun Kwok
